26-37

Nos. 958–959

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

HENRY ANTON PFISTER,

Petitioner,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN STATE BANK, HARTMAN AND SON, E. C. HOOK, AND EMIL GEEST,

Respondents.

ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPPOSING BRIEF OF RESPONDENTS.

JOHN K. NEWHALL,
Keystone Building,
Aurora, Illinois,
Counsel for All Respondents.

GEORGE D. CARBARY and
ALMORE H. TESCHKE,
Elgin, Illinois,
of Counsel for Respondent, Northern Illinois Finance Company.

JOHN V. MOORADIAN,
JOSEPH N. SIKES,
Waukegan, Illinois,
of Counsel for Respondent, E. C. Hook.

ELMER C. TOBIN,
Elgin, Illinois,
of Counsel for Respondent, Hartman and Son.

THOMAS J. PEDEN,
Libertyville, Illinois,
of Counsel for Respondent, Emil Geest.

HENRY L. COWLIN,
Crystal Lake, Illinois,
of Counsel for Respondent, Algonquin State Bank.

PRINTED BY CHICAGO LAW PRINTING CO.

SUBJECT INDEX.

PAGE

List of Authorities Cited.

PAGE

List of Authorities Cited (Continued).

Statutes.

Textbooks.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

Nos. 958-959

HENRY ANTON PFISTER,

Petitioner,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN STATE BANK, HARTMAN AND SON, E. C. HOOK, AND EMIL GEEST,

Respondents.

ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPPOSING BRIEF OF RESPONDENTS.

I.

OFFICIAL REPORT OF OPINION.

The opinion sought to be reviewed in this case is *Anton Pfister* v. *Northern Illinois Finance Corporation, Algonquin State Bank, Hartman and Son, E. C. Hook, and Emil Geest,* (CCA 7) reported 123 Federal 2nd 543, decided November 10, 1941 (Tr. 209-215 inclusive).

II.

NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING WRIT OF CERTIORARI IN THIS CASE.

The petition contains no special or important reasons for the granting of a review on Writ of Certiorari as re-

quired by rule 38A, paragraph 5, of this Court. This is not a decision of a State court. The opinion of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals on the same matter. The Circuit Court of Appeals did not decide an important question of local law which might conflict with applicable local decisions. It did not decide an important question of federal law which has not already been decided. It did not decide a federal question in conflict with the applicable decisions of this court. It did not depart from the usual course of jurisdictional proceedings, nor has it by its decision sanctioned any departure by any other local court which would call for the exercise of this court's power of supervision.

The decision of the Circuit Court of Appeals is in direct conformity with numerous decisions of this court and the respective Circuit Courts of Appeal as follows:

1. *Conboy* v. *First National Bank*, 203 U. S. 141, 51 L. ed. 128.
2. *C. M. & St. P. R. R. Co.* v. *Leverentz*, 19 F. 2d 915.
3. *Chapman* v. *Federal Land Bank*, 117 F. 2d 321.
4. *McIntosh* v. *U. S.*, 70 F. 2d 507.
5. *Clark* v. *Hot Springs Electric Light & Power Co.*, 76 F. 2d 918.
6. *N. W. Public Service Co.* v. *Pfeifer*, 36 F. 2d 5.
7. *Larkin Packing Co.* v. *Henderliter*, 60 F. 2d 491.
8. *Minz* v. *Lester*, 95 F. 2d 591.
9. *International Agricultural Corp.* v. *Cary*, 240 Fed. 101.
10. *In re David*, 33 Fed. 2d 748.
11. *In re Albert*, 122 Fed. (2d) 393.
12. *In re Miller* (*Miller* v. *Hatfield*) 111 Fed. (2d) 28 @ 32.
13. *In re Wister & Co.*, 237 Fed. 793.

III.

CONCISE STATEMENT OF FACTS.

The petitioner has sought to make the simple issues of this case complex. Petitioner has sought in his statement of the matters involved and the questions presented to confuse the material issues in this case by inserting immaterial matters into his statement of facts and arguments in his brief. To clarify the issues we are submitting the following statement as the pertinent facts:

We submit that the opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 209-215 inclusive) contains a concise and complete statement of the material facts necessary for the determination of the petition for writ of certiorari. We repeat in substance such statement of facts with references to the record.

On February 28, 1940, petitioner filed his petition as a farmer debtor under Section 75 of the Bankruptcy Act. His creditors did not accept his proposal and the debtor then filed, on July 19, 1940, his amended petition under Section 75 (s), through R. E. Coulson and J. E. Dazey, his attorneys (R. 25). This amended petition was referred to the Conciliation Commissioner on July 20, 1940, who thereafter acted as Referee under Sub-section (s) (4).

1. The Four Orders Complained of.

The Referee entered four orders; one on August 13, 1940, and three on September 7, 1940. The order of August 13, 1940 fixed the rental and principal payments to be made by the debtor (R. 72). The orders of September 7, 1940 related to the sale of what was termed perishable property (R. 77, 80, 82). The farmer debtor did not appeal or file a petition for review from any of these

orders within the ten-day period required by Section 39C of the Bankruptcy Act, 11 USCA, Section 67. No request for an extension of this ten-day period was ever made by farmer debtor pursuant to the provisions of said Act. The farmer debtor's failure to file such petitions caused these orders of August 13, 1940, and of September 7, 1940, to become final at the expiration of such ten day periods. After such ten day period and after such orders had become final, petitioner filed with the Referee his two petitions for rehearing. The petition for rehearing of the order of August 13, 1940 was filed September 16, 1940 (R. 139). The petition for rehearing of the orders of September 7, 1940, was filed September 29, 1940 (R. 88). On September 30, 1940, the referee denied the petition for rehearing of the orders of September 7, 1940 (R. 109) and on November 28, 1940, the Referee denied the petition for rehearing of the order of August 13, 1940 (R. 150). The petitioner then for the first time on October 9, 1940, filed his petition for review of the three orders of September 7, 1940 (R. 116). On November 28, 1940, he filed for the first time his petition for review of the order of August 13, 1940 (R. 165). Said petitions for review so filed were dismissed by the District Court on December 16, 1940, on the ground that it did not have jurisdiction to hear said petitions (R. 176). On December 30, 1940, the debtor filed his motion in the District Court to vacate the orders of December 16, 1940. This motion to vacate was based on the cases of *Bowman* v. *Lopereno*, 311 U. S. 262, and *Wright* v. *Union Central Life Insurance*, 85 L. ed. 166 (R. 178). This motion was denied by the District Court on January 14, 1941 (R. 179), Judge Holly stating that he had re-examined the opinion in the *Bowman* case and was of the opinion that the orders heretofore entered by him should stand. From the orders of the District Court of December 16, 1940, dismissing the respective petitions for review of the order

of August 13, 1940 and the orders of September 7, 1940, and the order of the District Court entered January 14, 1941, denying a reconsideration of the December 16th orders, petitioner took an appeal to the Circuit Court of Appeals of the Seventh Circuit where the orders of the District Court were affirmed (R. 179-180).

2. Two Separate Cases Involved.

There are actually two cases involved; one, the order of the District Court dismissing the petition for review of the order of August 13, 1940, being 7th CCA No. 7632, and the other, involving a similar order of the same court dismissing the petition for review of the three orders entered on September 7, 1940, being 7th CCA No. 7631. These two cases were consolidated in the Circuit Court of Appeals for hearing on appeal.

3. Issues Involved.

Simply stated, the only issue involved is whether or not the petitions for review were filed in apt time. It is therefore apparent that this matter involves one of procedure only.

Petitioner, however, in his statement of the case and brief, attempts to give a background of the circumstances surrounding the entry of the original orders of August 13, 1940 and September 7, 1940. The statements made by the petitioner's counsel in many instances are inflammatory, misleading, inaccurate and prejudicial and present a biased and unfair background on many matters immaterial to this issue and are not borne out by the record.

4. Order of August 13, 1940 (CCA No. 7632).

To illustrate, he contends, with reference to the order of August 13, 1940, (1) that the order was entered with-

out notice; (2) that the rental therein found was prohibitive; and (3) that the date of the moratorium is erroneous. None of these objections are germane to issues in this case, as will be hereinafter pointed out; nevertheless, we think the following factual background should be stated:

As to the first objection, the transcript in fact shows that a motion was filed by debtor himself for the fixing of such rental and was set for hearing by his own motion on August 13, 1940 (R. 8). Furthermore, at the hearing on August 13, 1940, the debtor, through his counsel, joined the creditors in asking that the rental be fixed (R. 113).

As to the second objection, the amount of the rental fixed by the order, the record in fact shows that the rental as fixed was an amount less than the maximum figure suggested as rental and principal payments by the debtor, through his counsel, Robert E. Coulson (R. 159-162 inclusive). It is difficult to conceive how the farmer debtor under such circumstances can complain.

As to the third objection to this order, the record in fact shows that the debtor in his own petition stated:

> "That your petitioner's moratorium began running on, to-wit: the 26th day of April, A. D. 1941, and said first year of said moratorium will expire on, to-wit: the 26th day of April, A. D., 1941" (R. 68).

The Referee followed this suggestion in fixing the stay period, and the error, if any, was therefore induced by the farmer debtor himself and his counsel. They are in no position to criticize the Referee in following their own suggestion.

5. Orders of September 7th (CCA No. 7631).

The orders of September 7th came on for hearing, pursuant to notice and order of court, on debtor's own motion, on August 13, 1940. On this day, the Three Credi-

tors offered witnesses to prove that the personal property in question was perishable within the meaning of the Act. After such witnesses were sworn, but before any evidence was given by them, debtor's counsel stated that such testimony was not necessary (R. 111). Thereupon said witnesses were withdrawn and the following stipulation was made of record:

> "Hearing on Reclamation Petition and stipulations by the debtor and each of the following claimants: Hartman and Son, Northern Illinois Finance Company, and Algonquin State Bank, that the personal property described in the petition is perishable within the meaning of Paragraph 2, Sub-section (s) of Section 75 of the Bankruptcy Act; it is further stipulated that the property described in the Reclamation Petition is not at this time claimed by the debtor as exempted property" (R. 10).

This matter was then continued to August 30, 1940, and on August 30 was again continued to September 7, 1940 (R. 10). On September 7, 1940, (25 days after such hearing), further hearing was had on said petition and the orders pursuant to the stipulations were entered (R. 77, 80, 82). At this hearing of September 7, 1940, farmer debtor was present in person (R. 113, para. 7) and was represented by two lawyers, Robert E. Coulson and U. G. Ward (R. 111). At that hearing, debtor was given a full opportunity to indicate his position before the entry of these orders. No proof was offered on the question of the sale of personal property nor was a request for time to put in additional proof asked for (Rec. 111). These orders were thereupon signed by the Referee in the presence of the farmer debtor and his two counsel (R. 113, para. 7).

6. Debtor's and Attorneys' Appearances Before Referee.

In all the proceedings before the Referee, from the first meeting of creditors on June 28, 1940 to and including the hearing of September 7, 1940, debtor was represented by Robert E. Coulson, his attorney. Mr. Dazey never appeared at any time (R. 109). During all of the hearings in this proceeding, debtor attended only two. The Referee on numerous occasions requested that the debtor and J. E. Dazey be present. Although in Dazey's affidavit, he alleges he suffered the illness on May 21st, 1940, more than a month before the first meeting of creditors, yet the Referee and the other parties to the proceedings were never notified of such alleged illness, and such illness was first claimed in the petition for rehearing filed September 20, 1940 (R. 114-115). The Circuit Court of Appeals found these facts to be true (R. 213-214).

It is evident that throughout the proceedings, the farmer debtor took no real interest in the proceedings, and his petitions for rehearing were not filed in good faith but "merely for the purpose of reviving and extending the time for filing a petition for review." (See CCA opinion, R. 213-214.)

Throughout petitioner's petition, his counsel has taken the liberty of misrepresenting statements of fact which are not borne out by the record. For example, at pages 33, 35, and 53 of his brief filed in this court, appear self-serving statements intended to give the impression that the orders of September 7th were not actually entered at such time. No references to the record bearing out these statements are made. As above stated, the record emphatically shows that these orders were entered and signed by the Referee on the date of their entry in the presence of the farmer debtor and his two counsel (R. 113-114). Many other misstatements of fact appear in the petition, but an enumeration of the same will serve no useful purpose.

IV.

ARGUMENT.

The decisions of the District Court and the Circuit Court of Appeals for the Seventh Circuit are manifestly correct, and follow a long line of decisions of this court and the several Circuit Courts of Appeal.

The petitioner in his petition and supporting brief has set out fifteen questions presented (his brief 10-13 inclusive) and has set out sixteen reasons why the writ for certiorari should be allowed (his brief 14-25 inclusive).

Many of the so-called questions presented and reasons for granting such a writ are repetitious and many are not applicable to this case. In lieu of these, we submit that the only questions presented to the District Court and the Circuit Court of Appeals were the following:

1. Did the orders complained of, viz: the orders of August 13, 1940 for fixing the rental, and the three orders of September 7, 1940 on the sale of the personal property, become final at the expiration of ten days from the entry thereof when no petitions for review of such orders were filed within ten days of the entry as provided by Section 39C of the Bankruptcy Act?
2. Did the petitions for rehearing of the orders of August 13, and the three orders of September 7, 1940, filed after the ten-day period for the filing of petitions for review under Section 39C of the Bankruptcy Act, have the effect (notwithstanding such petitions were denied) of lifting the bar of Section 39C which had already fallen, and did they have the effect of destroying the finality of those orders and create a new ten-day period for filing petitions for

review starting from the date of the denial of such petitions for rehearing?

3. Were the petitions for rehearing filed merely for the purpose of reviving and extending the time for filing the petitions for review?

4. The three orders of September 7, 1940 being consent orders, can such orders be appealed from or reviewed by petitions for review?

1.

The petitioner in the Circuit Court of Appeals made the following contentions:

1. That Section 75 (s) of the Bankruptcy Act and not Section 39C of such Act governs the time for filing petitions for review from the orders of the Referee in farmer debtor cases.

2. Even if the time for filing petitions for review in such cases are governed by Section 39C of the Bankruptcy Act, the petitions for review were filed in time, because the petitions for rehearing although filed after the ten day period provided by Section 39C of the Act, had the effect (although such petitions were denied) of lifting the bar of Section 39C which had already fallen.

These were the only contentions made by the petitioner in the Circuit Court of Appeals with reference to the above mentioned issues. No other or different contentions can now be made in his petition for writ of certiorari. *Sonzinsky* v. *U. S.*, 300 U. S. 506, 81 L. Ed., 772.

The authorities sustain the holding of the Circuit Court of Appeals that the petitioner's contentions were without merit.

It is readily apparent from a consideration of the pertinent statutes and the rules of the Supreme Court that the Circuit Court of Appeals was correct in holding that Section 39C and not Section 75 (s) governed the time for filing petitions for review (R. 209-212).

With the issue thus defined and established, we wish to refer to the quotation from Section 75 (s) in petitioner's brief (page 14). You will there note that that limitation is to objections, exceptions and appeals solely. No reference is made therein to petitions for review of referee's orders.

A reading of the section from which petitioner quotes shows that that section deals solely with appraisals and after pointing out the procedure on appraisals and the manner of appointment of appraisers, says:

> "Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

To further demonstrate that this section refers strictly to appraisals is the limitation that "either party may file objections, exceptions, and take appeals *within four months after* the date *the referee approved the appraisal.*"

Supposing these orders had been entered four months and one day after the referee had approved the appraisals. Would petitioner agree and would the court then hold that all right of review had been lost? This is too fallacious to warrant further discussion.

The purport of Section 75 of the Act cannot be clearly ascertained without a study of the Act itself and the general orders of the Supreme Court enacted thereon. A reading of both the Act itself and of the general orders of the United States Supreme Court make it clearly apparent that neither Congress nor the Supreme Court ever intended that Section 75 should contain all procedural limitations on matters arising under the act. In fact, in the quotation contained in petitioner's brief there is no limitation on petitions for review of referee's orders. The Supreme Court of the United States, under General Order L, Paragraph 11, appraised the incompleteness of this section when it adopted the following rule:

> "In so far as is consistent with the provisions of section 75 and of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section."

Congress itself in the act clearly signified that this section was not sufficient unto itself in procedural matters. It clearly manifested its intention that this act was to be administered in accordance with general bankruptcy procedure except as this section expressly provided to the contrary when it inserted the following language in paragraph 75 N:

> "In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when

> the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner, for the purpose of forwarding same to the clerk of court."

If this leaves any doubt as to the intention of Congress and the applicability of section 39C of the Bankruptcy Act in the Court's mind, we will call the following to the Court's attention.

The record in this case shows (R. 8) that farmer debtor on July 23, 1940 prior to the entry of the orders in question, amended his petition, asked to be adjudged a bankrupt under section 75 (s) and was on said date, viz., July 23, 1940, duly adjudicated a bankrupt.

The Act itself provides (75 (s) (4)) that after such adjudication the Commissioner shall continue to act and he shall then act as a referee and not as Commissioner:

> "The conciliation commissioner, appointed under sub-section (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of sub-section (s) of section 75 of this Act; and continue so to act until the case has been finally disposed of."

Under the above provision of the Act, it is clear that Mr. Givler was on the date of the signing the respective orders acting as a referee; that his powers and duties, powers and the rights and liabilities of the parties to this record, whereas pointed out in Section 75 (n) on such dates the same as if farmer debtor had filed a voluntary petition in bankruptcy. Under General Order L, Givler's powers and duties were those of a referee in bankruptcy.

This being all true and section 75 carrying no inconsistent provision, section 39C of the Chandler Act must

necessarily apply as to the date of the filing of petitions for review of referee's orders.

To hold that it did not and that section 75 was sufficient unto itself in this regard would be contrary to Congressional intention, and United States Supreme Court interpretation as shown above, and last but just as important to common sense, it would make all orders entered subsequent to four months of the approval of the appraisement final and impregnable to review, appeal or reconsideration.

The case of "*Sampayo* v. *Bank*, reported as *Benitez* v. *Bank of Nova Scotia*, 61 Supreme Court Reporter 953" cited by the farmer debtor states no difference or other rule. The only question presented to the court in that case was whether the definition of a farmer as set forth in section 75 (r) should govern in farmer debtor proceedings, or whether the definition of farmer appearing in Section 1, and (17) of the Chandler Act should control. The court simply held that the provision in Section 75 should apply since it is not changed by the revision, but the court clearly indicated that the very purpose of the Chandler Act was to make a comprehensive and careful revision of the bankruptcy law and applied generally to all proceedings thereunder.

There is no question that the limitation provided by Section 39C for the filing of petitions for review is mandatory and has the force of law and must be complied with in order to perfect a petition for review. This is borne out clearly in the case of *In re David*, Third Circuit, 33 Fed. 2nd, 748, where it appears that at the time of such decision there was a rule of the court which required that all petitions for review of an order of a Referee in a bankruptcy case must be filed within ten days after such order; (this in substance is the same as the present Section 39C of the Bankruptcy Act); and in holding that the

time specified by such rule is mandatory, the court said at page 749:

> "Long practice under this rule and like rules of other courts has demonstrated that the time is reasonable. Should a person fail to observe the rule—which is what happened here—he will of course forfeit the advantage which, by observing it, the rule affords him. Of this advantage he cannot later avail himself by a writ of certiorari, appeal or other indirect process, for the method of reviewing an order of a referee, prescribed by General Order 27 and the supplemental rule of the District Court is exclusive. *In re Greek Mfg. Co.* (D. C.) 164 F. 211; *In re Marks* (D. C.) 171 F. 281.
>
> "The petitions are dismissed."

This case, *In re David*, aforesaid; was cited with approval and upheld (contrary to petitioner's argument and contentions) in *In re Miller, Miller* v. *Hatfield*, 111 Fed. 2nd, 28, at 34. We would also like to point out that the *Miller* case last mentioned involved a farmer-debtor proceeding under Section 75.

Petitioner in his brief has cited various Sections of the Bankruptcy Act and has, in his brief, inserted isolated sentences from various Federal Courts. With his several citations as quoted, we have no argument, but he has isolated various statements of the courts which, if read with the balance of the decision, will not bear out the contention he makes, and the cases themselves, when the entire decision is read, support the contentions of the respondents herein. We will not attempt to analyze all of these decisions. We have hereinabove set forth the true and correct rule of law.

2.

Having set forth above that these orders became final on the 10th day after their entry, the remaining proposition is, was the finality of these orders destroyed by the subsequent filing of the untimely petitions for rehearing, which were not entertained, but denied, by the court?

The Circuit Court of Appeals and the District Court properly held that the petitions for rehearing did not revive or extend the time for filing petitions for review. These conclusions are sustained by the following authorities:

1. *Conboy* v. *First National Bank*, 203 U. S. 141, 51 L. ed. 128.
2. *C. M. & St. P. R. R. Co.* v. *Leverentz*, 19 F. 2d 915.
3. *Chapman* v. *Federal Land Bank*, 117 F. 2d 321.
4. *McIntosh* v. *U. S.*, 70 F. 2d 507.
5. *Clark* v. *Hot Springs Electric Light & Power Co.*, 76 F. 2d, 918.
6. *N. W. Public Service Co.* v. *Pfeifer*, 36 F. 2d 5.
7. *Larkin Packing Co.* v. *Henderliter*, 60 F. 2d 491.
8. *Minz* v. *Lester*, 95 F. 2d 591.
9. *International Agriculture Corp.* v. *Cary*, 240 Fed. 101.
10. *In re David*, 33 Fed. 2d 748.
11. *In re Albert*, 122 Fed. (2d) 393.
12. *In re Miller* (*Miller* v. *Hatfield*) 111 Fed. (2d) 28 @ 32.
13. *In re Wister & Co.*, 237 Fed. 793.

The leading case and conclusive of the question presented is *Conboy* v. *First National Bank*, 203 U. S. 141. This case has not been modified or departed from and com-

pletely sustains the ruling of the District Court. The facts in this case closely parallel the facts in our case and are as follows:

The Referee allowed a claim on May 7, 1904 against the bankrupt's estate. After the District Court affirmed this order the Circuit Court of Appeals, on January 23, 1905, also affirmed the same order. The law then in effect required that appeals from decisions of the Circuit Court of Appeals allowing a claim had to be made within thirty days. After the thirty days had expired and on April 25, 1905, the trustee petitioned the Circuit Court of Appeals to recall its mandate and vacate the order of January 23, 1905, which application was denied. On May 8, 1905, a petition for rehearing of the same order was filed and denied by the court on May 17th and an order entered to that effect on May 24th. An appeal was taken from the order of January 23, 1905 of the Circuit Court of Appeals, also from the order denying the motion to recall the mandate and from the order denying the petition for rehearing and a reversal of such orders was prayed. The appeal was made four months after the order of January 23, 1905, had been entered and three months after the time for appeal from such order had expired. The Supreme Court held that although a petition for rehearing had been filed; since it was denied; it did not extend the time from which an appeal could be taken from the order in question and, in so holding, the Court said at page 130:

> "But it is said that the limitation should be referred to the date of the order denying the petition for rehearing, and the trustee prayed an appeal from that order as well as from the judgment of January 23.
>
> "No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors. *Brockett* v. *Brockett*, 2 How.

238, 17 L. ed. 251; *Wylie* v. *Coxe*, 14 How. 1, 14 L. ed. 301. Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing.

"The cases cited for appellant, in which it was held that an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired. 'When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter.' *Credit Co.* v. *Arkansas C. R. Co.*, 128 U. S. 258, 261, 32 L. ed. 448, 449, 9 Sup. Ct. Rep. 107, 108.

"In the circumstances, the suggestion that there is but one term of the circuit court of appeals for the second circuit, and that, by the rules of practice of that court, petitions for rehearing may be presented at any time during the term, and therefore that this petition operated to enlarge the limitation of the bankruptcy act, is without merit.

"The petition was denied. Whether it could have been granted in view of the terms and spirit of the bankruptcy act, or the effect, if it had been, we are not called upon to discuss.

"Appeal dismissed."

An examination of the report in the *Conboy* case will disclose that the following cases cited by the petitioner

in his brief in this case, to-wit; *Brockett* v. *Brockett*, 2 How. 238, 11 L. ed. 251; *Aspen* v. *Billings*, 150 U. S. 31; *Texas* v. *Murphy*, 111 U. S. 488; and *Kingman* v. *Western*, 170 U. S. 675, were also cited by the petitioner in the *Conboy* case, *yet the Supreme Court by its decision in effect held that these decisions did not control since the petition for rehearing had been denied.* This is practically conclusive against the persuasiveness of these cases cited by the petitioner.

Again, as in the *Conboy* case, 203 U. S. 141, the facts in the case of *Chapman* v. *Federal Land Bank*, 117 F. 2d 321, closely parallel those in our case and its ruling fully supports the District Court and Circuit Court of Appeals. From the report of this case it appears that Mr. Elmer McClain, one of petitioner's counsel, represented the petitioners in the *Chapman* case. Of special significance is this case because it is the latest case that we have been able to find on the subject where the facts are the same as in this case. It is apparent from the opinion in the *Chapman* case that Mr. McClain made the same contentions for the petitioner and there cited substantially the same cases as he does in this present appeal and the Circuit Court of Appeals discusses both the *Wayne* v. *Owens-Illinois*, 300 U. S. 131 and *Bowman* v. *Lapereno*, 311 U. S. 362, being two of the cases most relied on by petitioner here and refused to follow these two cases but quoted from and followed the *Conboy* case cited by us.

The facts in the *Chapman* case are as follows: Two farmer-debtors filed their petition under Section 75 of the Act. The petitions were amended to seek the benefits of Sub-Section "S" of Section 75, as was done by the farmer-debtor in this case. The Commissioner filed a report recommending the denial of relief to the debtors under Sub-Section "S". On July 29, 1939, the District Court overruled objections to the Commissioner's Report and

terminated the proceedings. The debtors took no steps to review the order of July 29, 1939, until February 28, 1940, when for the first time they filed in the District Court a petition for rehearing grounded on three recent decisions of the Supreme Court announced since the entry of the order of dismissal on July 29, 1939, which decision as a matter of substantive law showed that the court had erred in dismissing the petitions of the farmer-debtors. The District Court overruled the petitions for rehearing on June 19, 1940, having entered on May 29, 1940, a memorandum "petition for rehearing denied." The bankruptcy act then provided appeals had to be taken within thirty days after the entry of the order. No appeal was taken within the time provided from the order of July 29, 1939. The petition to rehear this order was filed after the expiration of the time for appeal just as in our case where the petitioner filed his petitions for rehearing after the time provided by Section 39C. The Court held that the petition for rehearing did not resurrect the right of appeal which had already expired and dismissed the appeal. In doing so, it said:

> "(1) A petition for rehearing is addressed to the sound discretion of the court, and its denial is not the subject of appeal. *Roemer* v. *Bernheim (Roemer* v. *Neumann)*, 132 U. S. 103, 10 S. Ct. 12, 33 L. ed. 277; *Harris* v. *Mills Novelty Co.*, 10 Circ. 106 F. 2d 976, 978; *Stradford* v. *Wagner*, 10 Cir., 64 F. 2d 749; *Mintz* v. *Lester, supra.*
>
> "This has long been settled law. In *Conboy* v. *First National Bank of Jersey City*, 1906, 203 U. S. 141, 145, 27 S. Ct. 50, 52, 51 L. Ed. 128, a bankruptcy case, it was said: 'No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors.' The Supreme Court held that the right of appeal, lost by a failure

to make seasonable application for a rehearing within the thirty days allowed for appeal under an applicable general order, could not be restored by filing a petition for rehearing.

"Appellants contend that *Morse* v. *United States*, 270 U. S. 151, 46 S. Ct. 241, 70 L. Ed. 518, supports their argument. We disagree; for Chief Justice Taft said (opinion, 270 U. S. 154, 46 S. Ct. 242): 'The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, depends upon the due and seasonable filing of the motion for a new trial or the petition for rehearing.'

"Nor do we think that *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557, which recognizes the discretionary and nonappealable status of a motion for a rehearing, affords appellants any comfort. It was distinctly stated (opinion, 300 U. S. 137, 57 S. Ct. 385): 'A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuses to entertain it, does not extend the time for appeal.'

"(2) This language describes the plight of appellants in the instant case; for here the court did not grant a rehearing but 'overruled' the petition in a final order on June 19, 1940, after having entered on May 29, 1940, a signed memorandum: 'Petition for rehearing denied.'"

In *C. M. & St. P. Ry. Co.* v. *Leverentz*, 19 F. 2d 915, the court clearly points out that although a party may have a right to present a motion for a new trial after the time for appeal has gone by (which motion is in the nature of a petition for rehearing) yet where such motion is denied

and not granted, as was done in this case, the filing of such motion does not extend the time to appeal from the judgment in question. This is a leading case on this point and the Court said the following:

"'Plaintiff claims that after the lapse of three months from the entry of judgment no writ of error could be sued out and that the judgment thereby became absolute and not subject to further control by the trial court.

"Defendant claims that throughout the term at which the judgment was entered and throughout any valid extension of that term, it was entitled to make a motion for a new trial; that such motion if made within the term mentioned was in time, that it tolled the judgment, and that the time within which to sue out a writ of error would not begin to run until decision on the motion for a new trial.

"There are two rules relating to practice equally well settled which must be considered: '(1) That the time limited by statute within which to sue out a writ of error is fixed and unchangeable and is not subject to control by the court or by consent of parties. *Veritas Oil Corporation* v. *McLain, et al.* (C.C.A.) 4 F. (2d) 389; *Camden Iron Works Co.* v. *City of Cincinnati* (C.C.A.) 241 F. 846; *Elliott Machine Corporation* v. *Vogt Bros. Mfg. Co.* (D.C.) 267 F. 934; *Old Nick Williams Co.* v. *United States*, 215 U. S. 541, 544, 545, 30 S. Ct. 221, 54 L. Ed. 318; *Brooks* v. *Norris*, 11 How. 204, 207, 208, 13 L. Ed. 665.

"There is one exception to this rule—that where a motion for a new trial is seasonably made, it tolls the statute, and for the purpose of appeal, the judgment does not become final until decision of the motion. *Kingman* v. *Western Mfg. Co.*, 170 U. S. 675,

678, 18 S. Ct. 786, 42 L. Ed. 1192; *Payne* v. *Garth* (C.C.A.) 285 F. 301, 308.

"(2) 'That courts of the United States retain control over their judgments throughout the term at which they are entered. *Bronson* v. *Schulten*, 104 U. S. 410, 415, 26 L. Ed. 797; *U. S.* v. *Mayer*, 235 U. S. 55, 67, 35 S. Ct. 16, 69 L. Ed. 129; *Walker* v. *Moser* (C.C.A.) 117 F. 230, 232.

"When the time within which to sue out a writ of error was five years as provided in 1 Statutes at Large, c. 20, Sec. 22, p. 85, or two years, or one year, or six months, as it was by successive statutes, there was little danger of any conflict between these rules. A motion made within the term would also usually be within the five years or two years or one year or six months allowed for suing out a writ of error. When the court spoke of a motion being seasonably made it was usually made both within the term and also before the time had elapsed within which a writ of error might be sued out.

"With the time now reduced to three months within which to sue out a writ of error (43 Statutes at Large, c. 229, sec. 8, p. 940 (Comp. St. sec. 1126b)), there is abundant opportunity for trouble or misunderstanding with these rules.

"The true solution is to give effect to both rules.

(3) 'If after the entry of judgment, the period of three months shall fully lapse without the making of any motion for the modification or control of the judgment, the right to review on writ of error has been lost. There is no tolling of the time within which to bring error, when the time has already fully expired. The intention cannot be that by lapse of time the judgment shall be proof against a writ of error today, but that next week or next month, by reason of some act

of the party complaining of the judgment, it may be brought back, as it were, to the status in which it was during the three months next after its entry. When the right to bring error is once lost it cannot be revived. *Conboy* v. *First National Bank*, 203 U. S. 141, 27 S. Ct. 50, 51 L. Ed. 128. This case by analogy is quite persuasive. *Old Nick Williams Co.* v. *U. S.*, 215 U. S. 541, 544, 30 S. Ct. 221, 54 L. Ed. 318; *Brady* v. *Bernard & Kittinger* (C.C.A.) 170 F. 576; *Brady* v. *Bernard & Kittinger*, 217 U. S. 595, 30 S. Ct. 695, 54 L. Ed. 896; *Ewing* v. *Russell Hardware Co.* (C.C.A.) 295 F. 773, 776; *In re Steans & White Co.* (C.C.A.) 295 F. 833, 840.

"To have the right to sue out a writ of error and to extend the time therefor beyond the period of three months, the motion for a new trial must not only be made during the term, but it must be made during the three months next after the entry of the judgment and before the judgment becomes immune to a writ of error.

"Notwithstanding a defeated party may have lost the right to bring error, he may, under the rules, still have the right within the term to make a motion for a new trial, and to have the benefit of the court's judgment thereon. If the court shall grant the motion, a new trial will follow. If the court shall deny the motion, there is no remedy. The privilege of presenting a motion for a new trial and of having it heard and determined on its merits even after the time within which to sue out a writ of error has expired, is a valuable right. There is no authority for denying it in this case. The motion for a new trial should therefore be considered on its merits."

"The writ of error must, for want of jurisdiction in this court, be and it is ordered dismissed."

To the same effect is the case of *Clark* v. *Hot Springs ectric Light & Power Co.*, 76 Fed. 2nd 918, where it is d on page 921:

"The only power which the trial court had after the affirmance was to enforce the decree as affirmed, and to make an allowance for expenses. After a full hearing, it made such allowances on December 12, 1932. That order was appealable, but no appeal was taken within the statutory period. A petition for rehearing seasonably filed within the time for appeal will toll the time for appeal. But the petition was not filed within the time for appeal. A petition for rehearing cannot resurrect a right of appeal which has expired. If filed within the term, even after the time for appeal has expired, the trial court may grant it, thus vacate the decree, and start again. But if the rehearing is denied, the original decree stands, and the right of appeal is not revived. All this has been carefully spelled out by the courts. *Larkin Packer Co. v. Hinderliter Tool Co.* (C.C.A. 10) 60 F. (2d) 491; *Northwestern Public Service Co.* v. *Pfeifer* (C.C.A. 8) 36 F. (2d) 5; *Chicago, M. & St. P. Ry. Co.* v. *Leverentz* (C.C.A. 8) 19 F. (2d) 915; *Conboy* v. *First Nat. Bank of Jersey City*, 203 U. S. 141, 27 S. Ct. 50, 51 L. Ed. 128."

In *McIntosh* v. *United States*, 70 F. 2d 507, the final deres were entered on January 17, 1933. During the same m of court, but more than three months after the date the final decree and on May 16, 1933, petitions for rearing were filed and denied on May 29, 1933. The law effect at that time was that no appeals could be taken er the expiration of three months. The court held that filing of the petition for rehearing more than three nths after the entry of the final decree did not have the ect of lifting the bar of the statute which had already

fallen and had shut off the right of appeal. In so holding, the Court said:

> "We do not think that the right of the court to modify judgments within the term means that the limitation prescribed by Congress in an effort to minimize the evils of the law's delays may be evaded by the simple expedient of filing a petition for rehearing after the right of appeal has been lost by delay. A petition for rehearing filed within the term, but after the right of appeal has been barred by statute, will authorize the court to deal with the decree as it sees fit; but it will not restore the right of appeal therefrom which has been lost. See *Conboy* v. *First Nat. Bank of Jersey City*, 203 U. S. 141, 27 S. Ct. 50, 51 L. Ed. 128."

In *Northwestern Public Service Co.* v. *Pfeifer*, 36 F. 2d 5, the rule in the *Leverentz* case was held to be the reasonable one. In accord also is *Larkin Packer Co.* v. *Hinderliter*, 60 F. 2d 491.

All of the cases cited by the petitioner are distinguishable either on the ground that the petitions for rehearing were granted, the old judgment vacated and set aside and a new judgment entered after a hearing on the merits, as illustrated by the *Wayne* case, or on the ground that the petitions for rehearing were filed within the time provided for appeal and the order complained of had never become final until the disposal of the motion or petition.

The cases of *Kingman* v. *Western*, 170 U. S. 675; *Texas* v. *Murphy*, 111 U. S. 488; *Aspen* v. *Billings*, 150 U. S. 31; *Carpenter* v. *Condor*, 105 F. 2d 318; *U. S.* v. *Ellicott*, 233 U. S. 524; *Citizens* v. *Opperman*, 249 U. S. 449, and *Brockett* v. *Brockett*, 43 U. S. (2 How.) 238 are distinguishable on the ground that the motions for new trial or the petitions for rehearing involved in these cases were filed within the appeal time or the court assume that they were so filed.

In *Bowman* v. *Lopereno*, 311 U. S. 262, cited by petitioner, the order complained of was the order of adjudication in bankruptcy. *A petition for review within the required time was filed and certified to the District Court.* No disposition of the petition for review was made and it remained in abeyance in the District Court until October 25, 1937, at which time the order of adjudication was confirmed. On November 15, 1937, being within the appeal time, the petition for rehearing was filed asking that the order of adjudication be vacated and set aside. On February 17, 1938, the petition for rehearing was heard and denied. The matter was then appealed to the Circuit Court of Appeals on March 18, 1938.

It will be observed from the foregoing facts that the *Bowman* case is not analogous in facts to the case at bar. In that case the petition for rehearing was filed within the time allowed for appeal. In the case at bar it was not.

The *Bowman* case was not decided until after the District Court entered its orders dismissing the petitions for review. Motions were made by the petitioner requesting Judge Holly to reconsider the matter. At that time the District Court requested that the respective parties furnish copies of the briefs filed in the *Bowman* case and, after considering the briefs, the court reaffirmed its original orders and denied the motions to reconsider. The petitioner's brief in the *Bowman* case specifically set forth that they were mindful of the rule that when preparing the petition for rehearing and the filing of the appeal that the right of appeal once lost could not be revived by petition or motion for rehearing.

Furthermore, in the later case of *Chapman* v. *Federal Land Bank*, 117 F. 2d 321, relied upon by us, where the facts are substantially the same as the facts in this case, the court clearly distinguished the *Bowman* case and,

although it commented upon language used in the *Bowman* case, followed the *Conboy* case cited by us.

In *Gypsy Oil Co.* v. *Escow*, 275 U. S. 498, cited by petitioner, the petition for rehearing was filed within the period within which an appeal could be allowed which is an exception to the general rule. As previously stated, this is not the situation in the case at bar.

In *Morris v. United States*, 270 U. S. 151, the only question involved was whether leave was obtained to file a motion for a new trial. The court held that the mere application for a new trial, without the granting of such motion, was not sufficient to stay the running of the time for appeal and held that there was no jurisdiction for granting an appeal.

Other authorities have been cited by the petitioner which, upon examination, disclose that they are not in point, and for that reason we do not enter into a discussion of same.

3.

As a further and additional ground sustaining the decision of the District Court and the Circuit Court of Appeals, is the fact that it is apparent from the record that the petitions for rehearing filed after the time provided by Section 39C of the Bankruptcy Act for petitions for reviews, were merely filed for the purpose of reviving and extending the time for filing such petitions for review, and under the decision of this court in the case of *Wayne* v. *Owens Illinois*, 300 U. S. 131, an appeal should be dismissed where such appears to be the fact. In the opinion of the Circuit Court of Appeals, this was one of the reasons adopted by it in its opinion for holding as it did. In this regard the court said:

> "Another deciding feature is that it is quite apparent from the record here that Appellant's petition

for rehearing was filed merely for the purpose of reviving and extending the time for filing the petition for review, under which state of facts, the court in the *Wayne* case said an appeal should be dismissed'' (R. 213).

The cases cited by us establish without question that where a petition for rehearing is filed after the expiration of the time for appeal and such petition is denied, as was done in this case, the right to file a petition for review or an appeal has been lost and cannot be restored through the medium of such a petition for rehearing (although the result might be otherwise where such a petition for rehearing is granted, the case reopened and a new judgment entered, as decided in the *Wayne* case.)

4.

Orders of September 7th, CCA No. 7631, for the further reason are consent orders as such cannot be appealed from or reviewed by petition for review or writ of certiorari.

These are consent orders entered on the voluntary stipulation of debtor's counsel (R. 10), and there can be no legal error or injustice therein.

The stipulation on which these orders were entered was made at a hearing set on motion of debtor's own counsel. After that stipulation was made on August 13, 1940, the entire matter was continued for a period of 25 days to September 7, 1940, before any order thereon was entered. Some discussion must have taken place between debtor and his counsel during this interval with reference to these stipulations, because on the date of the entry of these orders, debtor himself was not only present in person but he was also represented not by one lawyer, but by two (R. 111 & 113). All of the pertinent facts touching these orders are contained in the concise statement of facts herein at Pages 6 and 7.

Counsel has argued that the stipulation contained in our statement of facts hereof was not authorized by the debtor. Reference to the concise statement of facts in this brief fully bears out the proposition that debtor authorized this stipulation prior to its entry at the hearing of August 13, 1940, and confirmed it at and prior to the date the orders in question were signed, because he personally sat through the hearing of September 7th, accompanied by his two lawyers, and allowed these orders to be entered without any objection, which brings this situation wholly within the case of *Curry* v. *Curry*, 79 Fed. (2d) 172 @ 174, wherein the court held:

> "It can never lie with a litigant, either by passive consent or by affirmative action, to lead a court to find a fact justified and fit to be carried into judgment and then to contend in another court that the same fact at the same time and within his own knowledge was otherwise and competent to support a contrary judgment. A consent decree within the purview of the pleading and the scope of the issues is valid and binding upon all parties consenting, open neither to direct appeal nor collateral attack. *A statement in a record on appeal that a party has consented to a decree, is equivalent to an admission that the facts exist on which the decree rests*, and the only question open is whether that decree could be entered in that cause or on any state of facts. (*Pac. R. Co.* v. *Ketchum*, 101 U. S. 289, 296, 297; 25 L. Ed. 932. *United States* v. *Babbit*, 104 U. S. 767, 26 L. Ed. 921; *Gauss* v. *Goldenberg*, 39 App. D. C. 597, 599.) And this principle has long been established in English courts where a decree taken by consent cannot be set aside by a bill of review, or a bill in the nature thereof except for clerical error or for something inserted but not consented to. 2 David ch. pr. 1576. Or as the Lord Chancellor put it in the time of Charles II, *there can be neither*

legal error nor injustice in a consent decree. (*Webb* v. *Webb*, 3 Swanst 656.) (Italics are ours.)

Where an order is entered, such as the three orders in question, with the express or implied consent of a party, he cannot appeal or sue out a writ of error to review the same, and is generally estopped and waives all right of appeal thereon.

"It is a well settled general rule, declared in some states by express statutory provision, that *a party is not aggrieved by* a judgment, *order*, decree or ruling regularly *rendered* or made, on agreement or otherwise, *with his express or implied consent*, and therefore *he cannot appeal or sue out a writ of error to review the same*, even though there has been an attempt to reserve the right to appeal, and even though the consent order was not authorized by the pleadings.

"Under this general rule, a party generally is estopped or waives right to appeal or bring error when a judgment, order or decree was entered on his motion, offer, or admission or at his request or in conformity with facts admitted by him." (Italics are ours.)

4 C. J. Secundum 404, Sec. 213.

Much is made of Dazey's physical condition, but, as is pointed out (R. 114-115), he became ill on May 21, 1940, more than a month prior to the first hearing and more than four months prior to the entry of the orders of September 7th. If he could not care for his practice, he owed the duty not only to his client but to the court to either engage other competent counsel or withdraw from the case entirely. His conduct in trying to ruin the career of a young attorney (Mr. Coulson) by calling him a "water boy" and blaming him for admissions apparently made with full knowledge and acquiescence of debtor, are, to

say the least, not commendable to such learned counsel as Mr. Dazey is portrayed to be.

As regards the debtor himself, the Circuit Court of Appeals in its opinion (R. 214-215) had the following to say:

> "The critical condition of debtor's counsel is to be deplored, but this alone will not excuse the negligence of the debtor in failing to inform the court of his attorney's condition. The debtor was not an ignorant man, for at one time he had been President of the Pure Milk Association of the Chicago area."

As stated above, Coulson was attorney of record for the debtor at the time the stipulation in question was entered.

> "*Where an attorney is the counsel of record for a client, his agreement* and the conduct and management of the litigation *must be considered as the agreement of his client*, and *if any of his acts are without sufficient authority as between him and his client, the remedy of the client is against his counsel.*" (Italics are ours.)

Bergman v. *Rhodes*, 334 Ill. 137 @ 142.

> "When one puts his case in the hands of an attorney, it is a reasonable presumption that the authority conferred includes such actions as the attorney, in his superior knowledge of the law, may decide to be legal, proper, or necessary in the prosecution of the suit, and consequently whatever adverse proceedings may be taken by the attorney are to be considered binding upon the client. Attorneys may waive objections with respect to pleading, or fail to file pleas, make admissions of fact, and of necessity make dis-

position of many things that arise in and about the trial of cases."

Union Central Life Insurance Co. v. *Anderson*, 291 Ill. App. 423 @ 436; 10 N. E. (2d) 46 @ 52.

To same effect see:

Clemens v. *Gregg*, (Cal.) 167 Pacific, 294 @ 297.
American Car Co. v. *Industrial Commission*, 335 Ill. 332.

A record has been made in this case of the various happenings therein. These records cannot be varied, changed, added to, or detracted from by *ex parte* affidavits, such as the affidavits of Dazey, McClain and Coulson.

"It is a well established rule of the common law, which has been embodied in statutes in a number of states, that when any judgment of any court or any other judicial or official proceedings, or any grant or other disposition of property, or any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document or series of documents, *the contents of such documents cannot be contradicted, altered, added to, or varied by* parol or extrinsic evidence." (Italics are ours.)

22 C. J. 1070-1074.

"It is contended on the part of appellant that such judgment was merely one of *nol pros*—a decree entered by default—and is, therefore, not a bar to the prosecution of this suit. To sustain this view of the case *he has recourse to a statement by the Clerk of the Circuit Court of the United States* for the Southern District of Ohio (wherein the decree was rendered), under his hand and seal, dated nearly two years after said decree was rendered, to the effect

that no proof or testimony was filed in said cause in his office either for the complainant or the defendant; that at the time of the granting of said decree, May 2, 1882, the complainant did not appear, nor was he represented by counsel; and that said decree dismissing the complainant's bill was granted on default of the complainant.

"*This is the record to which the court must look, and not to the statement of the clerk of the court* made two years afterwards. This decree on its face is absolute in its terms, is an adjudication of the merits of the controversy, and, therefore, constitutes a bar to any further litigation of the same subject between the same parties. As was said by this court in *Durant* v. *Essex Company*, 74 U. S. 7 Wall 107, 109 (19:154, 156): 'A decree of that kind, unless made because of some defect in the pleadings or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, it is a final determination.'" (Italics are ours.)

Lyons v. *The Perin & Gaff Mfg. Co.*, 125 U. S. 839 @ 841.

Section 75 (s) (2) of the Act provides:

"The Court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor."

We wish to point out that the stipulation made pertained solely to the facts surrounding the chattels described in the three orders of September 7th. *The stipulation does not constitute a general order that all such property is perishable within the meaning of the Act.*

A reading of petitioner's brief would indicate that Section 75 was enacted solely for the protection of the farmer

debtor but as Judge Hughes points out in *John Hancock Mutual Life Insurance Co.* v. *Bartels,* 84 L. Ed. 154 @ 157:

> "The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, *while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved.* See *Wright* v. *Vinton Mountain Trust Bank, supra; Adair* v. *Bank of American Nat. Trust & Sav. Asso.,* 303 U. S. 350, 354-357, 82 L. Ed. 889, 892-895, 58 S. Ct. 594, 35 Am. Bankr. Rep. (N.S.) 725; *Wright* v. *Union Cent. L. Ins. Co.,* 304 U. S. 502, 516, 517, 82 L. Ed. 1490, 1500, 1501, 58 S. Ct. 1025, 36 Am. Bankr. Rep. (N.S.) 950." (Italics ours.)

Proper notice of all proceedings herein was given debtor under the rules of court, (See Rule 1, Subsec. E of the Rules of U. S. District Court, Northern District of Illiniois, Eastern Division) which provides notice to be served on counsel of record who are residents of this District. Coulson was debtor's only resident counsel of record. Under this rule, notice to him constituted notice to debtor (Tr. 105).

With reference to the orders of September 7th, there is no complaint of coercion, fraud, or duress being practiced upon the farmer debtor in the procurement thereof. Whether under these conditions, Federal Courts will permit a litigant who after due notice of hearing set to come into court on that date and when his opponent is about ready to put in his proof waive the introdnction of such proof, enter into a voluntary stipulation, have that stipulation made a matter of court record, return to the same court

twenty-five days later, sit through a discussion of the order in the presence of two of his lawyers, watch the court enter the order based on the stipulation voluntarily made, and then after all time for review thereon has expired ask the court to set aside its order which it has entered with the express consent of farmer debtor so he can reopen the case and put his opponent to the unnecessary expense of bringing back witnesses whose testimony he waived when they were present in court ready to testify, is for this court to decide. We think debtor had full and ample opportunity to present whatever evidence or make whatever argument he wanted on the petitions at the time of the hearing thereon, or, if not then, at least prior to the entry of the orders which were entered twenty-five days after the original hearing at which the stipulation was made by his counsel.

CONCLUSION.

We respectfully submit that the petition for writ of certiorari heretofore filed herein by the petitioner be denied for the reasons and causes hereinabove set forth.

JOHN K. NEWHALL,
Counsel for all Respondents.

ELMER C. TOBIN,
Elgin, Illinois,
of Counsel for Respondent,
Hartman & Son.

JOHN V. MOORADIAN,
JOSEPH N. SIKES,
Waukegan, Illinois,
of Counsel for Respondent,
E. C. Hook.

PEDEN & OVERHOLSER,
Libertyville, Illinois,
of Counsel for Respondent,
Emil Geest.

HENRY L. COWLIN,
Crystal Lake, Illinois,
of Counsel for Respondent,
Algonquin State Bank.

GEORGE D. CARBARY and
ALMORE H. TESCHKE,
Elgin, Illinois,
of Counsel for Respondent,
Northern Illinois Finance Company.